88-1241

No. _____

Supreme Court, U.S.
FILED
JAN 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1988

GWENDOLYN PRICE, PETITIONER

v.

JOSEPH TANNER, HERBERT GREENHOLTZ, JR.,
JAMES W. PARIS, DON L. KNOWLES, and
THE STATE BOARD OF WORKERS COMPENSATION

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in resolving challenges under the Equal Protection Clause to state law, a Federal court must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.

2. Whether the denial of benefits to workers injured by an occupational disease's aggravation of a pre-existing condition comparable to the benefits received by workers injured by any other occupationally related aggravation of a pre-existing condition amounts to an unconstitutional deprivation of the equal protection of the law.

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FOR THE ELEVENTH CIRCUIT

GWENDOLYN PRICE, PETITIONER, petitions for a Writ of Certiorari to review the judgment of the United States

Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at ___ F.2d ____. The opinion of the District Court (Appendix B) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix D) was entered on September 22, 1988. A Petition for Rehearing In Banc was denied on November 1, 1988 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State ... shall deny to any person within its jurisdiction the equal protection of the laws.

2. Section 34-9-285 of the Official Code of Georgia Annotated provides, in relevant part:

> Where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any other way contributed to by an occupational disease, the compensation payable shall be reduced and limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as the causative factor, bears to all the causes of such disability or death.

STATEMENT

In January, 1983, Petitioner filed a claim for Workers' Compensation. It was found that she had sustained an injury, specifically an occupational disease arising out of the course of her employment which aggravated a pre-existing condition. Her award for total disability was reduced by 90%, in proportion to the impairment due to the pre-existing condition, pursuant to OCGA 34-9-285. In contrast, other workers with pre-existing conditions aggravated by occupational factors other than an occupational disease do not suffer a similar proportionate reduction.

Petitioner, while reserving her right to seek redress of her Federal Constitutional claims under the procedure set forth in England v. Louisiana

Medical Examiners, 375 U.S. 411 (1964), challenged in the state courts the constitutionality of OCGA 34-9-285 under the Equal Protection Clause of the Georgia Constitution. The statute was upheld. Price v. Lithonia Lighting Co., 256 Ga. 49 (1986) (Appendix C).

Following the Georgia Supreme Court's decision, the Equal Protection challenge to OCGA 34-9-285 resumed in Federal Court, where the basis for Federal jurisdiction lay in the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, 28 U.S.C. §§ 1331 and 1343, and 42 U.S.C. § 1983.

Respondents requested abstention by the Federal trial court, which was denied. Respondents asserted that this action was barred by the res judicata effect of the Georgia Supreme Court's

opinion, which assertion was rejected by the Federal trial court. Finally, Respondents moved for summary judgment on the ground that Petitioner failed to state a claim for which relief may be granted, which motion was granted. Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit.

In response to Petitioner's Equal Protection challenge, Respondents had offered two justifications to the trial court: to alleviate financial strain on certain high-risk industries and to recognize the difficulties of diagnosing when the aggravation of an existing condition itself becomes the cause of a disability. The panel of the Court of Appeals found neither justification convincing. Instead, the majority of the panel accepted a third

justification, which "initially was presented to this court during oral argument," that the challenged distinction encourages employment of the handicapped.

Circuit Judge Clark dissented. Respondent suggested Rehearing In Banc, which was denied.

Petitioner now seeks a Writ of Certiorari from this Court.

REASONS FOR GRANTING THE PETITION

The State of Georgia treats certain categories of workers differently than other categories. One such distinction denies benefits to workers injured by an occupational disease's aggravation of a pre-existing condition comparable to the benefits received by workers injured by any other occupationally related aggravation of a pre-existing condition. Petitioner challenged this distinction as a denial of the equal protection of the law.

Respondents asserted that there was a rational basis for the challenged distinction. The majority of the panel of the Eleventh Circuit accepted a justification for that distinction which "initially was presented to this court

during oral argument." That justification was that the challenged distinction encourages employment of the handicapped.

Issues raised on appeal are ordinarily limited to issues raised in the court below. Sherbert v. Verner, 374 U.S. 965 (1963), at 407. The rational basis test of equal protection analysis ought not to be resolved by an argument advanced on appeal if the alleged factual bases for such an argument have not been subjected to trial; no evidence has been proferred to show that the claimed rational basis is anything more than a fiction. Respondents did not put to the trial of cross-examination any evidence suggesting that policy considerations regarding employment of the handicapped do in fact underlie the distinction in benefits. Respondents

offered this pretext in the wrong forum, the Court of Appeals, where the Petitioner had no opportunity to challenge that pretext on the facts. "In determining whether or not state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." Williams v. Rhodes, 393 U.S. 23 (1968), at 30 (emphasis added); accord, Sayler Land Co. v. Tulare Water District, 410 U.S. 719 (1973), at 725.

In dissent, Circuit Judge Clark showed that the pretext is hollow. "A review of the history of the Georgia Workers' Compensation statute demonstrates that the Georgia legislature could not have contemplated such a

purpose [encouraging employment of the handicapped] in enacting § 34-9-285." It was enacted (in 1946) to eliminate potential unlimited recoveries employees might have received in common law actions subsequent to Covington v. Berkeley Granite Corp., 182 Ga. 235 (1936), and Berkeley Granite Corp. v. Covington, 183 Ga. 801 (1937). The purported rational basis for the distinction is at best, in Circuit Judge Clark's words, "mere sophistry." Many years later, the Georgia legislature did pass legislation to encourage employment of the handicapped, passing the Subsequent Injury Trust Fund, OCGA 34-9-350 et seq. (in 1977), and the Equal Employment for the Handicapped Code, OCGA 34-6A-1 et seq. (in 1981). These provisions, of course, were enacted many years too late to be deemed the rational

basis for discriminatory legislation passed in 1946.

However, even assuming that OCGA 34-9-285 was enacted to encourage employment of the handicapped, there must be some nexus between the means and the ends of legislative classification, Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), and Respondents proferred no evidence to the trial court that such a nexus does in fact exist. Unburdened by facts, Respondents claimed that subsidizing industries that handicap workers is a means to ensure employment of handicapped workers. Circuit Judge Clark in dissent labelled the suggestion "ludicrous."

This equal protection challenge was resolved in the Court of Appeals without full consideration of the facts and circumstances behind the enactment of

OCGA 34-9-285, the interests which the State of Georgia claims to be protecting, and the interests of the Petitioner, whose interests were disadvantaged by the classification imposed by OCGA 34-9-285. Even the rational basis test requires that such facts be considered; speculation offered on appeal is not an adequate factual basis for resolution of this challenge. Had the facts behind Respondent's pretext of employment of the handicapped been in the record, the denial of benefits to Respondent, who was injured by an occupational disease's aggravation of a pre-existing condition, comparable to the benefits received by workers injured by any other occupationally related aggravation of a pre-existing condition, would have been held to be an unconstitutional deprivation of the equal protection of the law.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

_____

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Gwendolyn PRICE, Plaintiff-Appellant,

v.

Joseph TANNER, Commissioner
of Labor of the State of Georgia,
et al., Defendants-Appellees.

No. 87-8045.

United States Court of Appeals,
Eleventh Circuit.

Sept. 22, 1988.

Appeal from the United States District Court
for the Northern District of Georgia.

Before VANCE and CLARK, Circuit Judges, and GARZA *, Senior Circuit Judge.

VANCE, Circuit Judge:

This appeal involves the issue whether a Georgia Workers' Compensation statute, Ga. Code Ann. §34-9-285, violates the equal protection clause of the fourteenth amendment to the United States Constitution. Section 34-9-285 provides that where an employee is disabled by the aggravation of a pre-existing condition by an occupational disease, workers' compensation benefits are limited to an

amount representing the portion of disability attributable to the occupational disease. Georgia Workers' Compensation Act, however, does not contain a similar provision limiting benefits to employees disabled by the aggravation of pre-existing conditions by work-related occurrences, such as accidents or injuries, other than occupational diseases. Finding that the statute is rationally related to a legitimate state interest, the district court granted summary judgment in favor of appellee. We affirm.

I.

During her childhood Gwendolyn Price suffered from numerous respiratory problems. In 1971, she was diagnosed as having chronic bronchiectasis disease. Two years later, Price began working for Lithonia Lighting Company. Over the course of her employment at Lithonia Lighting

Price was exposed to fumes, chemicals and dust which aggravated her respiratory condition. Due to her continuing respiratory problems, Price had to leave her job in January of 1983.

Price filed a claim for workers' compensation benefits on January 11, 1983 with the State Board of Workers' Compensation. An administrative law judge ("ALJ") found that Price had "sustained an accident arising out of and in the course of her employment which aggravated her pre-existing lung problems." Finding that Price was totally disabled, the ALJ awarded her $135 per week for total economic disability plus medical expenses. Lithonia Lighting appealed the ALJ's decision to the Full Board of the State Board of Workers' Compensation. On appeal it was determined that only ten percent of Price's disability was attributable to the aggravation of her condition as a result

of her employment. Accordingly, Price's award was reduced to $13.50 per week pursuant to section 34-9-285.[1]

Price sought review of the administrative award in the state court after the Superior Court of Rockdale County, Georgia affirmed the award, Price filed an application for a discretionary appeal to the Georgia Supreme Court challenging the constitutionality of section 34-9-285. The Georgia Supreme Court upheld the constitutionality of the statute. See Price v. Lithonia Lighting Co., 256 Ga. 49, 343 SE2d 688 (1986).[2]

While awaiting the resolution of the state court proceedings, Price instituted this action in Federal District Court alleging that section 34-9-285 violated her federal constitutional rights.[3] Price maintained that section 34-9-285 violated the equal protection clause of her fourteenth amendment because of the

statute's restrictive rule for determining benefits for persons disabled due to the aggravation of a pre-existing condition by an occupational disease. In the complaint, Price alleged that "[t]here is no rational basis for the distinction drawn by [the] statute between disability resulting from occupational factors and disability resulting from all aggravating factors." The district court held that there was a rational basis for the distinction.[4] The district court found that the rational basis test was satisfied by the two justifications asserted by the state: (1) to alleviate a financial strain on certain industries; and (2) to recognize the problem arising from the gradual onset of occupational diseases of determining when the aggravation of a pre-existing condition becomes the cause of the disability. This appeal followed.

II.

The equal protection clause of the fourteenth amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, §1. A violation of the equal protection clause may occur when a legislature body enacts a law which "has a special impact on less than all the persons subject to its jurisdiction ...." New York City Transit Auth. v. Beazer, 440 U.S. 568, 587-88, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979). The Supreme Court, however, consistently has recognized that "the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways." Reed v. Reed, 404 U.S. 71, 75, 92 S.Ct. 251, 253, 30 L.Ed.2d 225 (1971). An equal protection analysis, therefore, requires as a "preliminary step" a determination of

"whether persons who are similarly situated are subject to disparate treatment." Johnson v. Smith, 696 F.2d 1334, 1336 (11th Cir. 1983).

Georgia's Workers' Compensation Act (the "Act"), Ga. Code Ann. §§34-9-1 et seq., does not compensate all disabled employees in the same manner. Employees receive full compensation for compensable disabilities arising solely as a result of a work-related injury[5] solely as a result of an occupational disease,[6] or as a result of the aggravation of a pre-existing condition by a work-related injury other than an occupational disease. If, however, an employee is disabled by the aggravation of a noncompensable, preexisting condition by an occupational disease, compensation is reduced to the proportion the occupational disease is the cause of the disability. Ga. Code Ann. §34-9-285. Employees who are disabled due

to the aggravation of pre-existing conditions are similarly situated with other disabled employees with respect to the purpose of the legislation. Because the compensation for these disabled employees is calculated in a different manner, we find that the preliminary step is satisfied.

Where groups are similarly situated, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, 437 U.S. 432, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985); Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979). Where the classification interferes with the exercise of a fundamental right or operates to the disadvantage of a suspect class, the equal protection analysis

requiring strict scrutiny is substituted for the general rule. City of Cleburne, 105 S.Ct. 3255; Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566-67, 49 L.Ed.2d 520 (1976). The parties agree that the standard of review applicable to this case is the "rational basis" test.[7] Under this test "we will not over turn ... a statute unless the varying treatment of different ... persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." Vance, 440 U.S. at 97, 99 S.Ct. at 943, see Western & Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 674, 101 S.Ct. 2070, 2086, 68 L.Ed.2d 514 (1981) (equal protection challenge will not succeed if the state's purpose is legitimate and the rational relationship question is "'at least debatable'")

(quoting United States v. Carolene Prods. Co., 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938)). The application of the rational basis test to social or economic legislation "allows the states wide latitude." City of Cleburne, 105 S.Ct. at 3254; see United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 174, 101 S.Ct. 453, 459, 66 L.Ed.2d 368 (1980); McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 1104-05, 6 L.Ed.2d 393 (1961).

The state asserts that section 34-9-285 ensures three legitimate state purposes: (1) to alleviate a heavy financial burden on the industries where individuals are likely to file more claims; (2) to recognize that occupational diseases have a gradual onset making it difficult to determine when an aggravating injury actual occurs; and (3) to encourage the employment of handicapped persons. We

note that appellees have not provided great assistance to this court by identifying compelling reasons for the legislation. We have some question that either of the first two justifications may be classified as a legitimate state interest.[8] Because only one reason, however, is necessary to sustain the statue, see Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 465, 101 S.Ct. 715, 724, 66 L.Ed.2d 659 (1981), we turn to the third purpose advanced by the state.

The third justification offered by appellees initially was presented to the court during oral argument. Although this argument was not presented to the district court, we are obligated under the rational basis test to consider any legitimate state interest however it comes before us. See Western & Life Ins. Co., 451 U.S. at 674, 101 S.Ct. at 2086 (in determining the

validity of legislation under the equal protection clause by the court may analysis considerations presented to the state legislature and those of which it takes judicial notice) (quoting Carolene Products Co., 304 U.S. at 154, 58 S.Ct. at 784-85); Dandrige v. Williams, 397 U.S. 471, 475 n. 6, 90 S.Ct. 1153, 1156-57 n. 6, 25 L.Ed.2d 491 (1970) (an appellee may assert any justification in support of a judgment in its favor "whether or not that ground was relied upon or even considered by the trial court").

The third justification offered by appellee provides a basis for sustaining section 34-9-285. This justification, encouraging the employment of the handicapped, is a legitimate state interest. See Dandridge v. Williams, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970). Furthermore, as appellees maintained, the statute is

rationally related to this objective. We believe that the Georgia legislature could reasonably find that the employment of persons afflicted with occupational diseases could be enhanced by reducing employers' potential exposure of extraordinary compensation costs resulting from such preexisting diseases.

Appellant does not question the justifications asserted by the state. Rather, appellant asserts that the disparate treatment of employees disabled by the aggravation of a pre-existing condition is not relevant to the state's purpose of providing support for all disabled persons. Appellant argues that the "etiology of an injury" should not limit the amount of compensation because any disability effects a person's earning capacity. The equal protection analysis, however, does not require this court to determine whether the legislation will

fully achieve its articulated purposes. Clover Leaf Creamery Co., 449 U.S. at 466, 101 S.Ct. at 725. As a federal court, we "do not sit as arbiters of the wisdom or utility of these laws." Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth., 825 F.2d 367, 370 (11th Cir. 1987), cert. denied ____ U.S. ____, 108 S.Ct. 1022, 98 L.Ed.2d 987 (1988). Instead, our sole inquiry is whether the Georgia legislative "could rationally have decided" that its purpose would be achieved. Clover Leaf Creamery, Co., 449 U.S. at 466, 101 S.Ct. at 725. We, therefore, hold that section 34-9-285 is rationally related to a legitimate state interest and does not violate the fourteenth amendment's equal protection clause.[9]

AFFIRMED.

CLARK, Circuit Judge, dissenting:

My disagreement with the majority is a narrow one. I agree that the State's

claim that §34-9-285 does not violate the equal protection clause is untenable: (1) on the ground that the statute was intended to alleviate a financial burden from those industries in which employees are likely to sustain more injuries, and (2) on the basis that occupational diseases have a gradual onset thus making it difficult to determine when an aggravating injury actually occurs. I also agree with the majority that Georgia workers who contract occupational diseases are denied equal protection of law. The only issue of differences between us is whether there is any rational basis for concluding that §34-9-285 encourages the employment of the handicapped.

In equal protection cases "the mere recitation of a benign compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory

scheme." Weinberger v. Wiesenfeld, 420 U.S. 636, 648, 95 S.Ct. 1225, 1233, 43 L.Ed.2d 514 (1975). A court need not "accept at face value assertions of legislative purpose ... when an examination of the legislative scheme and its history demonstrate that the asserted purpose could not have been a goal of the legislation." 420 U.S. at 648 n. 16, 95 S.Ct. at 1233 n. 16. See also Minnesota v. Clover Leaf Creamery, Co., 449 U.S. 456, 463 n. 7, 101 S.Ct. 715, 723 n. 7, 66 L.Ed.2d 659, (1981) (applying Weinberger).

The majority makes the following statement and demonstrates a clairvoyance beyond my ken:

> We believe that the Georgia legislature could reasonably find that the employment of persons afflicted with occupational diseases could be enhanced by reducing employers' potential exposure to

extraordinary compensation costs resulting from such preexisting diseases.

Maj.Op. at slip. opinion page 4762, at page ___. A review of the history of the Georgia's Workers' Compensation statute demonstrates that the Georgia legislature could not have contemplated such a purpose enacting §34-9-285.

I. The 1920 Act[10]

In 1920 Georgia enacted its first statute which limited the financial liability of employers for injuries growing out of the accidents during employment and provided benefits for all workers injured by accident arising from the employment whether or not the employer was responsible for the injury.

The Act limited compensation in cases where an injury aggravated an employee's preexisting injury or disability:

> If an employee who suffers an injury in his employment has a permanent disability or has sustained a permanent injury ... suffered elsewhere, he shall be entitled to compensation only for the degree of incapacity which would have resulted from the later accident if the earlier disability or injury had not existed.

1920 Ga.Laws 167, 186, §34, Ga. Code §114-408 (1933). Georgia courts interpreted §§114-408 "so as 'to subject employers only to liability for ... injuries resulting to employees during the time of ... employment' and not to compensate the employee as if the prior injury had never occurred." Barry v. Aetna Life & Casualty Co., 133 Ga. App. 527, 211 S.E.2d 595, 599 (1974) (citations omitted). See e.g., Georgia Insurance Service v. Lord, 83 Ga. App. 28 62 S.E.2d 402, 404-05 (1950)

(employee who was blind in his right eye prior to losing the vision in his left eye as a result of a work-related injury could recover workers' compensation benefits only for the blindness in his left eye. The Georgia Workers' Compensation Act provided compensation only for "injuries" occuring out of and in the course of employment. The term "injury" did not encompass occupational diseases: "'injury' and 'personal injury' ... shall not include a disease in any form except where it results naturally and unavoidably from [an] accident." 1920 Ga.Laws §2(d), Ga. Code §114-102 (1933). Despite the failure of the Act to compensate for occupational diseases, employees beset with such diseases were not left without a remedy for their disability. In 1936, the Georgia Supreme Court stated:

> The remedy provided by [the Act] is exclusive within the field of its

> operation, but it does not exclude redress in cases to which it is not applicable. Consequently, if [the Act] does not apply to an "occupational disease" ... the employee may maintain an ordinary or common law action for damages against his employer, provided a cause of action exists in his favor relating to the liability of a master, independently of the [Act].

Covington v. Berkeley Granite Corp., 182 Ga. 235, 184 S.E. 871 872 (1936). A year later, the court made it clear that a common law action for damages against an employer would could be maintained by an employee who had been disabled by silicosis because occupational diseases were not compensable under the Act. See Berkeley Granite Corp. v. Covington, 183 Ga. 801, 190 S.E. 8, 12 (1937).

II. The 1946 Act

In 1946, the Georgia legislature amended the Act by adding to it a chapter on occupational diseases. 1946 Ga.Laws 103 et seq. The new chapter limited compensable occupational diseases to poisoning (by 22 chemicals or substances), x-rays or radioactive substances, asbestosis, and silicosis. Ga. Code §114-803 (1946). As it does today in §34-9-285, the chapter on occupational diseases apportioned compensation in cases for an occupational disease aggravated an employee's preexisting noncompensable infirmity or condition or where an employee's noncompensable infirmity or disease aggravated his preexisting occupational disease." Since in 1946 all other injuries that aggravated preexisting permanent injuries or disabilities were not fully compensated, supra at I. The 1920 Act, the apportionment of

compensation and aggravation of occupational disease cases resulted in equal treatment for all Georgia employees.

From 1946 until 1978 there was no denial of equal protection of the laws to the workers in Georgia, i.e., no disparate treatment during those 32 years with respect to compensation to employees who had preexisting injuries, conditions, or diseases. Although enactment of the 1946 statute added to the scope of the Workers' Compensation those employees who contracted occupational diseases while at work, there is nothing to support the pure conjecture by the majority, (and by the State of Georgia attorney who first raised the subject at oral argument) that the 1946 statute was passed for the purpose of encouraging the employment of handicapped workers who had an occupational disease or a condition that would be aggravated by certain types of working conditions.

Instead, one objective of the 1946 statute was to eliminate the unlimited recovery an employee might receive in a common law action such as Covington v. Burkeley Granite Corp., supra. Another logical objection was to provide coverage for injured workers who might not recover in a common law action.

Nor does the statute encourage the employment of the handicapped as is refuted by Ms. Price's case. Ms. Price had bronchiectasis, which is "a chronic inflamatory or degenerative condition of one or more of the bronchi marked by dilation and loss of elasticity of the [bronchi] walls." Webster's Unabridged Third New International Dictionary 282 (1976). When Ms. Price was employed by Lithonia Lighting Company, there is no evidence that Lithonia Lighting asked Price about her health when it hired her or otherwise knew that she had

bronchiectasis. Nor is there any evidence that price suspected that her bronchiectasis would be aggravated by working at Lithonia Lighting. While employed at Lithonia Lighting, Price worked over a tank of acid and was exposed to paint fumes and gases given off by wood alcohol. The working conditions aggravated her respiratory problems, and she was forced to leave Lithonia Lighting in January of 1983. The majority states the following: We believe that the Georgia legislature could reasonably find that the employment of persons afflicted with occupational diseases could be enhanced by reducing employers' potential exposure to extraordinary compensation costs resulting from such preexisting disease. Ms. Price was not afflicted with a preexisting occupational disease when employed by Lithonia Lighting. Employment of the

"handicapped" was not a decisional factor in her being employed.

III. The 1977-78 Act.

In 1977 the Georgia legislature added a section to the Workers' Compensation statute, Ga.Laws 1977, Vol. 1 at 608. "Chapter 114-9. Subsequent Injury." The preamble to the statute states in part: "An Act to amend Code Tile 114, relating to workmen's compensation, as amended, so as to encourage the employment of handicapped persons by protecting employers for excess liability for compensation for certain injuries; ...." This statute is now codified as §34-9-350, et seq.

The statute creates a Subsequent Injury Trust Fund and authorizes assessments against insurers or self-insurers according to a formula based upon the total workers' compensation claim paid by an insurer or self-insurer as those

claims bear to the total workers' compensation claim paid by all insurers and self-insurers in the state during the preceding calendar year. The purpose of the Fund to make available money to reimburse the insurers or self-insurers for a portion of the medical expenses and income benefit payments to employees who have sustained an injury which impaired and merged with a pre-existing injury. In the first instance, the employer or insurer pays the employee the amount of compensation benefits owed and then is reimbursed by the fund according to a formula set forth in the statute.

IV. The 1978 Statute.

The 1977 statute as such did not encourage employment of handicapped workers because §114-408 was not repealed until 1978. Section 114-408, supra at slip. opinion page 4763, at page ___,

forbade payment of compensation for any portion of disability allocable to a pre-existing disability or injury. In 1978, the Legislature repealed existing §114-408 (along with §§114-409 and 114-410) and, to give life to the 1977 Act, substituted a new §114-408 entitled "subsequent injury" which included the following:

> (c) Total disability by subsequent injury.
>
> (1) An employee who has a prior disability as described in Article 9 of this chapter and who sustains a subsequent injury which combines with the prior injury to produce total disability shall be entitled to income benefits as provided in Code Section 34-9-261. The loss of both hands, feet, arms, legs, or the loss of any two of them or the total loss of vision of both eyes shall be

presumed to be total disability, subject to rebuttal.

(2) An employer who makes payment under this subsection shall be entitled to reimbursement as determined by Article 9 of this chapter.

1978 Ga.Laws 2220, §6 (codified as Ga. Code §34-9-241(c)).

The legislature did repeal that part of the 1946 Occupational Disease Act (now §34-9-285) which apportion compensation benefits by limiting payment by employers to those employees having a preexisting disease for only that part of the disabling disease allocated to the claimant's employment. The Georgia law as it now stands authorizes full compensation to employees whose disabling injuries merges with a preexisting injury and results in total disability. The change in law is illustrated by reference to

Georgia Insurance Service v. Lord, supra at slip. opinion page 4763 at page ____, in which case the court held that the employee who was blind in his right eye prior to losing his vision in his left eye as the result of a work-related injury could recover only partial disability compensation for blindness in his left eye. An employee under identical circumstances would now be compensated for total disability.

Employees with a preexisting condition or disease who become totally disabled by virtue of an occupational disease do not receive full compensation. Ms. Price's receipt of only the minimum compensation of $25.00 per week instead of $135.00 per week is the result of the failure of the Legislature in 1978 to repeal §114-805 (now §34-9-285). The disparity in treatment of persons situated as Ms. Price, as compared with those such

as an employee who losing sight in his only good eye, lead to this lawsuit to declare unconstitutional the statute as applied to those employees who become totally disabled by virtue of occupational diseases and yet receive only partial compensation. The majority in the second paragraph of Part II acknowledges the disparate treatment and that the statutory scheme is unconstitutional and necessary as a "rational basis" for the differences in treatment.

The foregoing history and current statute of the Georgia law establish beyond dispute that the majority's "rational basis" for the disparate treatment of workers who contract occupational diseases is mere sophistry. The 1946 Act (§34-9-285) was not enacted to encourage employers to hire the handicapped. That Act limited the compensation to the extent the disease was

attributable to the employment. The 1920 Act (§114-408) similarly limited compensation where an injury was superimposed on a prior condition. It is obvious from the legislative history that the Georgia Legislature did not enact legislation to encourage employment of the handicapped until 1977. This was 31 years after passage of the statute here under attack.

Under the rational basis test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Id. 473 U.S. at 440, 105 S.Ct. at 3254 (citations omitted).[12] That recognition is only the beginning of the inquiry, for the rational basis test has long been a source of confusion and debate. See, e.g., United States Railroad Retirement Bd. v. Fritz, 449 U.S. 166, 176 n. 10, 101 S.Ct. 453,

460 n. 10, 66 L.Ed.2d 368 (1980) ("The most arrogant legal scholar would not claim that [our] cases applied a uniform or consistent test under equal protection principles."); Schweiker v. Wilson, 450 U.S. 221, 243 n. 4, 1 S.Ct. 1074, 1087 n. 4, 67 L.Ed.2d 186 (1981) (Powell, J., dissenting) ("The court has employed numerous formulations for the 'rational basis' test. Members of the Court continue to hold divergent views on the clarity with which a legislative purpose must appear, and about the degree of deference afforded the legislature in suiting means to the ends.") (citations omitted). The disagreement over the meaning of the rational basis test is understandable. However well its language may read, the test in the end depends for its application upon words such as "arbitrary," "legitimate," and "rational," which are subject to many

differences of opinion. Accord Illinois State Bd. v. Socialist Workers, 440 U.S. 173, 188-89, 99 S.Ct. 983, 992, 59 L.Ed.2d 230 (1979) (Blackmun, J., concurring) ("[P]hrases [such as 'compelling state interest' and 'least drastic means'] are really not very helpful for constitutional analysis. They are too convenient and result oriented."). Nevertheless, certain general propositions about equal protection and rational basis bear repeating.

First, the rational basis test requires more than a mere connection between means and ends. "[T]he objectives of a legislative classification can be characterized on different levels of generality .... As one moves to higher levels of generality, the likelihood of finding rational grounds for distinction increases." Brest & Levinson, Processes of Constitutional Decisionmaking 560-61

(1983). This is because any regulation can be validated through the use of sophistry or a non sequitur:

> It is always possible to define the legislative purpose of a statute in such a way that the statutory classification is rationally related to it .... The nature of the burdens or benefits created by statute and the nature of the chosen class's commonality will always suggest a statutory purpose -- to so burden or benefit the common trait shared by members of the identified class. A statute's classification will be rationally related to such a purpose because the reach of the purpose has been derived from classifications themselves.

Note, Legislative Purpose, Rationality, and Equal Protections, 82 Yale L.J. 123, 128 (1972). Cf. Tribe, American

Constitutional Law 995 (1978) (without requiring a legitimate public purpose, "it would seem useless to demand and discover even the most perfect congruence between means and ends, for each law would supply its own indisputable fit: if the means chosen burdens one group and benefits another, then the means perfectly fit the end of burdening just those whom the law disadvantages and benefitting just those whom it assists"); Fritz, 449 U.S. at 180, 101 S.Ct. at 462 (Stevens, J., concurring) ("if the analysis of legislative purpose requires only a reading of the statutory language in a disputed provision, and if any 'conceivable basis' for a discriminatory classification will repeal a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do"). For example, a statute requiring the

installation of exhaust emission devices on blue cars has a tautological objective -- reducing emissions on blue cars -- but it cannot seriously be argued that such a statute passes constitutional muster: "such self validation is obviously inconsistent with any criterion for rationality." Brest & Levinson, Processes of Constitutional Decisionmaking 560 (1983). See Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 882 n. 10, 105 S.Ct. 1676, 1684 n. 10, 84 L.Ed.2d 751 (1985) (rejecting state's contention that "any discrimination subject to the rational relation level of scrutiny could be justified simply on the ground that it favored one group at the expense of another").

Second, it is axiomatic that "[n]o bright line divides the merely foolish from the arbitrary law." Schweiker, 450 U.S. at 243, 101 S.Ct. at 1087 (Powell,

J., dissenting). As a result, each equal protection case turns on its particular factual scenario. Liberty Warehouse Co. v. Burley Tobacco Growers Co-op, 276 U.S. 71, 91, 48 S.Ct. 291, 295, 72 L.Ed. 473 (1928). See also Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 725, 93 S.Ct. 1224, 1228, 35 L.Ed.2d 659 (1973) ("In determining whether or not a state law violates the Equal Protection clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.") (citation omitted).

Third, the equal protection clause is not static. Because the clause is not "shackled to the political theory of a particular era, ... [n]otions of what constitutes equal protection ... do change." Harper v. Virginia State Board,

383 U.S. 663, 669, 86 S.Ct. 1079, 1083, 16 L.Ed.2d 169 (1966). See, e.g., Brown v. Board of Education, 347 U.S. 483, 494-95, 74 S.Ct. 686, 691-92, 98 L.Ed. 873 (1954) (holding that the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896) was unsupported by modern authority).

Fourth, the rational basis test is "not a toothless one." Mathews v. Lucas, 427 U.S. 495, 510, 96 S.Ct. 2755, 2764, 49 L.Ed.2d 651 (1976). In recent cases, the Supreme Court has carefully analyzed the legitimacy of asserted state purposes, e.g., Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985) and Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982), in assessing the rationality of a statute. If no legitimate state purpose is served, there is then no rational basis for creating the unequal classifications in

the challenged statute. The Court has also closely scrutinized the means/ends nexus of legislative classifications, e.g., Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) and Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1958), in striking down state classifications. In addition, the Court has reviewed legislative records and other relevant evidence bearing on the rationality of a particular classification. See, e.g., Cleburne Living Center, 473 U.S. at 447-450, 105 S.Ct. at 3258-60; Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648, 670-74, 101 S.Ct. 2070, 2084-86, 68 L.Ed.2d 514 (1981); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464-70, 101 S.Ct. 715, 724-27, 66 L.Ed.2d 659 (1981).13

In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972), a Louisiana workers' compensation statute denying death benefits to dependent, unacknowledged, and illegitimate children of deceased employees was challenged on equal protection grounds. The Supreme Court, applying the rational basis test,[14] held that the statute violated the equal protection clause. The defendant insurance company had argued, among other things, that the statute was constitutional because it lessened the possible problems of locating illegitimate children and determining uncertain claims of parenthood. The Court reviewed that argument in light of the overall purpose of the Louisiana workers' compensation scheme and stated that while it "fully respect[ed] Louisiana's choice on [that] matter, ... the inferior classification

... [bore] no significant relationship to those recognized purposes of recovery [i.e., providing compensation to disabled employees and their families] which workmen's compensation statutes commendably serve." Id. at 174-75, 92 S.Ct. at 1406.

As did the Court in Weber, we think it is proper to evaluate §34-9-285's rationality in light of the overall goal of the Georgia Workers' Compensation Act. The Georgia courts have consistently held that the Act is "'a humanitarian measure' providing relief to the injured employee and protecting employers from excessive damage awards." Koger Properties, Inc. v. Adams-Cates Co., 247 Ga. 68, 274 S.E.2d 329 (1981) (citation omitted). Even if §34-9-285 by its operation suggested the purpose of encouraging employment of the handicapped as contented by the majority,

§34-9-285 is inconsistent with the overriding purpose of the Act.

The maximum compensation limits placed on injured employees under the Act already serve the purpose of "protecting employers from excessive damage awards." Even if a disabled employee can recover the maximum benefits under the Act, such benefits are bound to be less than his previous salary. See Ga.Code Ann. † 34-9-261(a) (1987)(in cases of total disability, the employee shall be paid a "weekly benefit equal to two-thirds of [his] average weekly wage but no more than $155.00 per week"). Consequently, § 34-9-285 provides a windfall for employers engaged in those industries where those few employees with preexisting conditions are disabled because of occupational diseases. By apportioning income compensation only in cases where preexisting conditions have been aggravated by occupational diseases,

§34-9-285 denies workers like Ms. Price the full measure of workers' compensation benefits while at the same time benefiting those industries most likely to injure employees. This inequity is a far cry from the underlying theory of workers' compensation--that "the cost of the product should bear the blood of the workman." Prosser, Handbook of the Law of Torts 530 (5th ed. 1971).

Like all other insurers, workers' compensation insurers rate employers according to risk factors: "Theoretically, employers are charged a premium based on the relative safety of their workplaces as measured by reported employee injuries and illnesses.... Employers will therefore engage in preventive safety efforts only as long as such efforts are less costly than the payments they must make to the workers' compensation fund." Schroeder & Shapiro, Responses to Occupational Dis-

ease: The Role of Markets, Regulation, and Information, Geo.L.J. 1231, 1245 (1984). The apportionment of occupational disease claims, coupled with the structure of the insurance system and the difficulty of proving such claims, provide disincentives for employers to eliminate or control such diseases, id. at 1245-47, thus leading to a vicious circle of more disabled workers. It seems difficult to square this result with any notion of rationality or with the theory behind workers' compensation. As Professor Larson has noted, the general rule is that when a preexisting condition is aggravated by a work-related occurrence, the entire disability is compensable. 1B Larson, The Law of Workmen's Compensation §59.22(a) (1987). See also Griggs v. Lumbermen's Mutual Casualty Co., 61 Ga.App. 448, 6 S.E.2d 180 (1939) ("It is not necessary, in order for an employee to recover com-

pensation as an injured workman, that he must have been in perfect health or free from disease at the time he received the injury. Every workman brings with him to his employment certain infirmities; his employer takes him as he finds him and assumes the risk of a diseased condition aggravated by injury."), aff'd 190 Ga. 277, 9 S.E.2d 84 (1940).

Given the high risk of injury or disability faced by employees in industries with occupational diseases, and the inability of those employees to pursue tort actions against their employers, §34-9-285 is not rationally related to the overall legitimate purpose of the Act: providing sustenance to disabled employees.

Assuming arguendo that the purpose of §34-9-285 was to encourage the employment of handicapped persons, §34-9-285 violates the equal protection clause because it is not rationally related to

that purpose. It is ludicrous to suggest that discrimination only against employees disabled by aggravating occupational diseases rationally furthers the encouragement of handicapped persons.

In Williams v. Vermont, 472 U.S. 14, 105 S.Ct. 2465, 86 L.Ed.2d 11 (1985), car buyers who bought and registered their cars outside of Vermont before becoming Vermont residents filed suit challenging, on equal protection grounds, Vermont's requirement that they pay a full use tax in order to register their cars in the state. Under the Vermont statutory scheme, the state collected a use tax when a car was registered with it but not if the car was purchased in Vermont and the buyer had paid a sales tax. The tax was reduced by the amount of any sales or use tax paid to another state if the state would afford a credit for taxes paid to Vermont in similar circumstances. The credit, however,

was available only if the person registering the car was a Vermont resident at the time he paid the taxes. Id. at 15, 105 S.Ct. at 2468. Vermont argued, in part, that the statute was constitutional because it was consistent with the state's policy that those persons using the roads should pay for them. The Supreme Court disagreed: "This 'basic policy' arguably supports imposition of the use tax on [out-of-state car buyers], and the denial of a credit to them; but it provides no rational reason to spare Vermont residents an equal burden." Id. at 2526, 105 S.Ct. at 2473. The reasoning of Williams is applicable here. If encouraging the employment of handicapped employees is the goal of §349285, there is no rational justification for attempting to accomplish that goal with an uneven hand by burdening only those employees whose preexisting conditions are aggravated by occupational

disease. Cf. Shapiro v. Thompson, 394 U.S. 618, 637-38, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) ("A state purpose to encourage employment provides no rational basis for imposing a one-year waiting period restriction [for welfare eligibility] on new residents only."); Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1039-40 (5th Cir.1980) (Vance, J.)(assuming legitimacy of goal of preventing truancy, ordinance making it unlawful for coin-operated amusement centers to allow persons under the age of 17 to play or operate a coin-operated amusement machine violated equal protection because it singled out coin-operated amusement centers for its policy of preventing truancy), rev'd in part on other grounds, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982), on remand, 713 F.2d 137 (5th Cir.1983).[15]

For the foregoing reasons, I respectfully dissent.

FOOTNOTES

1. Ga. Code Ann. §34-9-285 provides in part:

> Where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any other wise contributed to by an occupational disease, the compensation payable shall be reduced and limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of disability or death as such occupational disease, as the causative factor, bears to all causes of such disability or death.

2. While it held that section 34-9-285 was constitutional, the Georgia

Supreme Court vacated the award and remanded the case to the superior court with an instruction that pursuant to Ga. Code Ann. §34-9-261 an award of $25 per week be substituted. Price, 343 S.E.2d at 692.

3. The district court found that appellant expressly reserved her right to seek redress of her federal constitutional claims by informing the state court of her intent. See England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 419, 421-22, 84 S.Ct. 461, 466-67, 467-68, 11 L.Ed.2d 440 (1964) (by informing the state court of an intention to return to federal district court should the state court decision be unfavorable, a party reserves the right to litigate federal claims in federal district court).

4. In the motion for summary judgment, appellees initially requested the court to abstain from exercising its jurisdiction. Stating that the abstention doctrine does not operate where, as in this action, the state court proceedings have concluded, the district court found that abstention was inappropriate. See Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975). The district Court also rejected appellee's argument that the action was barred by the doctrine of res judicata. The court reasoned that because the Georgia Supreme Court decision does not clearly indicate whether the federal constitutional issue was decided and appellant expressly reserved her right to litigate the federal claim in a federal court, the doctrine of res

judicata also was inappropriate. Neither of these findings were appealed to this court, and we do not address them.

5. The Act defines "injury" as "only injury by accident arising out of and in the course of employment and shall not, except as hereinafter provided, include a disease in any form except where it results naturally and unavoidably from the accident." Ga.Code Ann. §34-9-1(4).

6. The Act provides a list of diseases considered as occupational diseases provided such listed disease "is due to causes and conditions which are characteristic of and peculiar to the particular trade, occupation, process, or employment in which the employee is exposed to such

disease...." Ga.Code Ann. §34-9-280(3).

7. Appellant did not allege the existence of any fundamental right or a suspect class so the rational basis test is appropriate.

8. Even assuming that the second justification is legitimate, we believe that rather than alleviating this causation problem, the proportional compensation scheme of section 34-9-285 actually creates the problem advanced by the state.

9. We wish to emphasize that it is not difficult to satisfy the rational basis test. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881, 105 S.Ct. 1676, 1683, 84 L.Ed.2d 751. Indeed, we do not decide that section 34-9-285 "is wise, that it best fulfills the relevant social and

economic objectives that [Georgia] might ideally espouse, or that a more just and humane system could not be devised." Dandridge, 397 U.S. at 487, 90 S.Ct. at 1162. Arguably a more equitable result could be achieved if the Georgia legislature amended this provision to provide full compensation to employees disabled as a result of occupational diseases. As the Supreme Court noted "the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." City of Cleburne, 105 S.Ct. at 3254.

10. Explanation of citation to Georgia Statutes. While there have been seven official codifications of Georgia laws only two are applicable here, the 1933 Code and the 1981

Code. Citation will be to the statutes and both codes unless a statute has been repealed, in which instances the 1981 Code will not be cited. Parenthetically, the Act involved here was originally titled "Workmen's Compensation Act" but is now titled "Workers' Compensation." These may be used here interchangeably.

11. Where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated, prolonged, accelerated, or in any other wise contributed to by an occupational disease, the compensation payable shall be reduced and limited only to such proportion of compensation that would be payable if the occupational disease were the

sole cause of the disability or death as such occupational disease, as the causative factor, bears to all causes of such disability or death. Compensation shall be adjusted by reducing the number of weekly payments or the amounts of such payments as, in the circumstances of the particular case, may be determined by the board.

Ga. Code §114-805 and §34-9-285.

12. Thus, the test "contains two substantive limitations on legislative choice: legislative enactments must implicate legitimate goals, and the means chosen by the legislature must bear a rational relationship to those goals." Lyng v. International Union, __ U.S. __, __, 108 S.Ct. 1184, 1194, 99 L.Ed.2d

380 (1988) (Marshall, J., dissenting).

13. Whatever the reach of the rational basis test, it seems safe to say that the test, as applied today, is not always as deferential as it was in cases like Williamson v. Lee Optical Co., 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed.2d 563 (1955). See Cleburne Living Center, 473 U.S. at 458, 105 S.Ct. at 3264 (Marshall, J., concurring) ("however labeled, the rational basis test invoked today is most assuredly not the rational basis test of Williamson ... and [its] progeny").

14. Although the Supreme Court in Weber was somewhat unclear as to the standard of review it used, see 406 U.S. at 172-73, 92 S.Ct. at 1405, it relied on Levy v. Louisiana, 391 U.S.

68, 71, 88 S.Ct. 1509, 1511, 20 L.Ed2d 436 (1968), a case which employed the rational basis test. The Weber Court was, of course, motivated by a concern over the condemnation of illegitimate children simply because of their status, but it did not hold that classifications involving illegitimate children were subject to heightened scrutiny. Even if Weber involved a more searching scrutiny, however, its approach is consistent with the rational basis test applied by the Court in recent cases such as Cleburne Living Center.

15. Moreover, because §34-9-285 apportions income benefits for employees whose preexisting condition is aggravated by an occupational disease, such handicapped persons (for lack of a better term) would probably be reluctant to work in

industries where occupational diseases were prevalent. Handicapped persons might forego employment because of the knowledge that they would only be partially compensated if completely disabled by an occupational disease. Thus, the incentive to employers, if §34-9-285 can be called that, would therefore not make a real difference in the hiring of handicapped persons.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORIGA
ATLANTA DIVISION

GWENDOLYN PRICE	§	
	§	
vs.	§	CIVIL NO.
	§	
JOSEPH TANNER, Commission of Labor of the State of Georgia, HERBERT GREENHOLTZ, JR.; JAMES W. PARIS; DON L. KNOWLES; and STATE BOARD OF WORKERS' COMPENSATION	§	C85-3776

ORDER

This civil rights action alleging that O.C.G.A. §34-9-285 violates Plaintiff's Fourteenth Amendment equal protection rights is now before the court on Defendant's motion for summary judgment.

The parties concur in the material facts. In 1971 Plaintiff was diagnosed as having chronic brochiectasis disease. In 1973, Plaintiff began her employment with Lithonia Lighting Company ("Lithonia

Lighting"). In the course of her employment, Plaintiff was exposed to paint fumes and certain gases given off by wood alcohol used as a cleaning solvent. Plaintiff stopped working for Lithonia Lighting in January of 1983 due to her lung condition.

On January 11, 1983, Plaintiff filed a claim for workers' compensation. The ultimate disposition of her claim was that Plaintiff had sustained an accident arising out of and in the course of her employment which aggravated her pre-existing lung condition. As a result, she became totally disabled in January of 1983. Although Plaintiff's award for total disability was $135 per week, her award was reduced to $13.50 pursuant to O.C.G.A. §34-9-285 because her total disability was comprised 90% of a pre-existing condition, and 10% of aggravation

as a result of her employment with Lithonia Lighting.

O.C.G.A. §34-9-285 states in pertinent part:

> Where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated ...by an occupational disease, the compensation payable shall be reduced and limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of the disability....

Occupational disease is defined in O.C.G.A. §34-9-280(3).

Plaintiff thereafter instituted this action alleging that O.C.G.A. §34-9-285

violates her Fourteenth Amendment right of equal protection, seeking declaratory judgment and injunction. Specifically, Plaintiff alleges that if her pre-existing condition had been aggravated by accident, or by any other compensable factor under the Workmen's Compensation Act, her disability award would not have been proportionately reduced. See O.C.G.A. §34-9-261; O.C.G.A. §34-9-263. Plaintiff alleges that O.C.G.A. §34-9-285 therefore discriminates against her on the basis of which compensable factor aggravated her pre-existing condition.

Defendants first request this court to abstain from exercising its jurisdiction over the present action. The abstention doctrine applies when a federal plaintiff has asked a district court to interfere with an ongoing state proceeding on the basis the statute involved is

unconstitutional. Younger v. Harris, 401 U.S. 37 (1971); Hoffman v. Pursue, Ltd., 240 U.S. 592 (1975). Herein, the state court proceeding has completely terminated, including appellate review. Price v. Lithonia Lighting Co., 256 Ga. 49 (1986). Further, this court has afforded proper respect for the state court proceeding by staying the present action until notification that a final state court opinion has been rendered. Therefore, the court finds abstention at this time would be inappropriate.

Defendants next assert that this action is barred by the doctrine of res judicata. A state court judgment has preclusive effect herein if it would have preclusive effect under Georgia law pending in Georgia courts. 28 U.S.C. §1738; Allen v. McCurry, 449 U.S. 90 (1980); Gresham Park Community

Organization v. Howell, 652 F.2d 1227 (5th Cir. Unit B 1981). The defense of res judicata has been considered viable when a court of competent jurisdiction renders a final judgment on the merits, against identical parties pertaining to the same cause of action. Ray v. Tennessee Valley Authority, 677 F.2d 818, 821 (11th Cir. 1982); Sellers v. United States, 569 F. Supp. 1149, 1152 (N.D. Ga. 1983).

Plaintiff asserts the doctrine of res judicata does not apply to this case because there was no federal constitutional challenge in the state court proceeding. Plaintiff asserts although she informed the state courts of her federal claims, she expressly reserved them for review herein by the procedures set forth in England v. Louisiana Medical Examiners, 375 U.S. 411 (1964) and Government Employees v. Winsor, 353 U.S. 364 (1957).

The court is persuaded that application of res judicata is inappropriate herein. The Georgia Supreme Court opinion does not make it clear whether the federal equal protection question was decided. In framing the issue the court stated: "We granted appellant's application for discretionary appeal for the purpose of determining whether §34-9-285 is unconstitutional." In stating its holding the court concluded: "We disagree with appellant's argument that this disparity in treatment violates the Equal Protection Clause." There is no indication elsewhere in the next which Equal Protection Clause the court ruled on, and there is no mention of plaintiff's reservation of the federal question. Price v. Lithonia Lighting Co., 256 Ga. 49 (1986).

Even if the Georgia Supreme Court did uphold §34-9-285 on federal grounds, the

court finds plaintiff is entitled to litigate her federal constitutional challenge in this court. A litigant has a right to a federal district court determination of a federal claim. England v. Louisiana Medical Examiners, 375 U.S. 411, 415-16. In cases where there is a pending state court proceeding, the litigant must expressly reserve his rights by informing the state court of his constitutional objections and of his intent to return to federal court for their determination. England, supra, at 421-22. Plaintiff has submitted quotations from portions of her superior court brief showing she reserved her claims in accordance with the procedure set forth in England. In the absence of a showing by defendants that plaintiff lost her reservation by voluntarily, fully litigating her claims in state court,

England, at 421, plaintiff is entitled to proceed in this action. Therefore, the court will reach the merits of defendants' motion.

Defendants move for summary judgment on the ground that Plaintiff has failed to state a claim upon which relief may be granted. The parties agree that Plaintiff does not rest her equal protection claim on the existence of any fundamental right and that the statute does not discriminate against a suspect class. Ordinarily such a claim would be reviewed under a rational basis standard. Reed v. Reed, 404 U.S. 71 (1971). However, statutory classification in the area of economics and social welfare do not violate the Equal Protection clause because they are imperfect. Jefferson v. Hackney, 406 U.S. 535, 546 (1972). A legislature may address one problem at a time or select

one phase of one field and select a remedy there. Id. at 546. Further, the Equal Protection clause does not require a state to choose between attacking every aspect of a problem or not attacking at all. Dandridge v. Williams, 397 U.S. 471, 486-7 (1970). In order to prevail on this motion, Defendants need only present a set of facts which reasonably may be conceived to justify the classification. Id. at 485. Reed v. Reed, supra.

Defendants proposed two justifications for the enactment of O.C.G.A. §34-9-285. First, because occupational diseases are widespread in the industrial world certain industries are likely to sustain a heavy financial burden from increased claims. Therefore, the purpose of O.C.G.A. §34-9-285 may be alleviate the financial strain on those industries. Second, Defendants assert

that it is often difficult to determine when aggravation of a pre-existing condition becomes the cause of the disability. Occupational diseases have a gradual onset due to a day by day exposure to unhealthy or harmful conditions. In the case of compensable accidents, however, the accident and damage resulting therefrom are usually "practically simultaneous."

In her response, Plaintiff asserts there is no rational relation between O.C.G.A. §34-9-285 and the goal of protecting certain industries. First, the statute fails to define which industries are strained by the Workers' Compensation Act and limit the reduction of benefits under §34-9-285 to those industries. Additionally, the statute fails to extend the proration of benefits when other compensable injuries, such as accidents,

aggravate non-compensable pre-existing conditions. Plaintiff's assertions do suggest the Georgia legislature may have drawn its statutory lines imperfectly, however, this is insufficient to sustain an equal protection claim. Plaintiff concedes in her that protection of industries may have been the Georgia legislature's motivation. Under the rational basis standard set forth above, this is sufficient to defeat Plaintiff's claim.

The court reaches the same conclusion with respect to Defendants' second justification. Plaintiff concedes the problem of proximate causation justifies imposition of special evidentiary requirements to prove certain classes of injury. See O.C.G.A. §34-9-261; 34-9-266; 34-9-280. However, plaintiff asserts, it does not justify the apportionment of

benefits in certain classes of injury. The problem of proximate causation is sufficient to satisfy statutory classifications under the Equal Protection clause, so long as the classification is not invidious. Plaintiff has made no showing of invidious discrimination.

Accordingly, Defendants' motion for summary judgment is hereby GRANTED.

SO ORDERED, this 1 day of December, 1986.

ORINDA D. EVANS
UNITED STATES DISTRICT JUDGE

43157. PRICE v. LITHONIA LIGHTING COMPANY.

(343 SE2D 688)

MARSHALL, Chief Justice.

We granted the appellant's application for discretionary appeal in this workers' compensation case. The question for decision concerns the constitutionally of OCGA §34-9-285. Where an occupational disease aggravates, or is aggravated by a noncompensable disease or infirmity, §34-9-285 provides that the workers' compensation award will be "limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as the causative factor, bears to all the causes of such disability or death." However, where an occupational disease is not involved, the Workers' Compensation Act (referred to

hereinafter at times as the Act) contains no provision comparable to §34-9-285. The appellant argues that this disparity in treatment violates the Equal Protection Clause. For reasons which follow, we hold that the appellant's constitutional attack is without merit.

The appellant, Gwendolyn Price, was employed by the appellee, Lithonia Lighting Company, for approximately 10 years. During her childhood and adolescence she had pneumonia, frequent colds, and coughs. As a result of her respiratory problems, she had to leave the job she had held prior to becoming employed by the appellee. Her lung problems were aggravated as a result of her breathing fumes, chemicals, or dust at her place of employment with the appellee. She was diagnosed as having, among other things, chronic bronchiectic lung disease.

She filed a claim for workers' compensation benefits with the State Board of Workers' Compensation. The administrative law judge found that there is a direct causal connection between the working conditions at the appellant's place of employment and the aggravation of her lung condition, and that the appellant, therefore, has "sustained an accident arising out of and in the course of her employment which aggravated her pre-existing lung problem." The administrative law judge also found that the appellant is totally disabled. Consequently, the appellant was awarded the sum of $135 per week for total economic disability, as well as medical expenses.

The appellee appealed to the Full Board of the State Board of Workers' Compensation. The full board referred the

matter to the Medical Board of the State Board of Workers' Compensation under OCGA §34-9-311. The medical board found that the appellant suffers from pre-existing bronchiectasis; that her condition has been aggravated as a result of her employment with the appellee; and that the appellant is totally disabled, but that only 10 percent of her disability is attributable to the aggravation of her condition as a result of her employment. The full board adopted the findings of the medical board, and the appellant was awarded an indemnity benefit of $13.50 per week under OCGA §34-9-285, supra, which provides:

"Where an occupational disease is aggravated by any other disease or infirmity not itself compensable or where disability or death from any other cause not itself compensable is aggravated,

prolonged, accelerated, or in any other wise contributed to by an occupational disease, the compensation payable shall be reduced and limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as the causative factor, bears to all the causes of such disability or death. Compensation shall be adjusted by reducing the number of weekly payments or the amounts of such payments as, in the circumstances of the particular case, may be determined by the board."

Before the full board, the appellant argued that §34-9-285 violates the Equal Protection Clauses of the United States and Georgia Constitutions. This argument was rejected. The appellant appealed the award of the full board to the Rockdale

Superior Court under OCGA §34-9-105. She again advanced the argument that §34-9-285 unconstitutionally denies her equal protection. The superior court affirmed the award. We granted the appellant's application for discretionary appeal for the purpose of determining whether §34-9-285 is unconstitutional, as argued by the appellant.

1. As a general matter, to authorize compensation under the Workers' Compensation Act, an employee must sustain an accidental injury arising out of and in the course of his employment. Bibb Mfg. Co. v. Cowan, 85 Ga. App. 816, 817 (70 SE2d 386) (1952).

In this regard, the Workers' Compensation Act provides that "'[i]njury' or 'personal injury' means only injury by accident arising out of and in the course of the employment and shall not, except as

hereinafter provided, include a disease in any form except where it results naturally and unavoidably from the accident." OCGA §34-9-1(4).

Accordingly, prior to enactment of the occupational-disease provisions of the Workers' Compensation Act, it was held: "In order to be compensable under the compensation act the disease must arise out of, or result from an accident or injury arising out of, and in the course of, the employment. If the facts show a causal connection between the injury and the development of the disease the victim of the disease is entitled to compensation. It has been held that where a disease results from a sudden or unexpected inhalation of gas or fumes it results from an accident or injury within the meaning of the compensation acts. Although the decisions on the subject are

not uniform and can not be entirely reconciled, generally diseases resulting from unusual and unexpected inhalation of gas fumes or dust result from accident within the meaning of the compensation act, but where the injury is the natural result of the existence of conditions necessarily incidental to the work being performed, as where the resulting diseases are occupational diseases, it is held that they do not result from accident. 71 CJ 593, §344." Lumbermen's Mut. Cas. Co. v. Lynch, 63 Ga. App. 530, 532-533 (11 SE2d 699) (1940).

2. However, "[t]he rapid industrial growth of World War II focused attention on harmful effects employees endured from use of 'elements, metals, and chemical by-products' in the manufacturing process. Morgan, L., 'Occupational Diseases Under the Georgia Workmen's Compensation Act,'

8 Mercer Law Review 333 (1957). The legislature added a new chapter to the existing workers' compensation code in 1946. It brought under the workers' compensation umbrella certain enumerated occupational diseases. They were limited to four: (1) poisoning (by certain agents); (2) diseased condition caused by exposure to X-rays or radioactive substances; (3) asbestosis; and (4) silicosis. The remedy given for the four occupational diseases was made the exclusive remedy. All common law rights under existing laws were reserved for diseases not listed. Ga. L. 1946, p. 109.

"In 1971 the Code was amended to add another category of occupational diseases beyond the original four. It was a broad provision which included those occupational diseases where the employee could prove all of the following elements:

(It is now OCGA §34-9-280(3)(F) (i thru ii).)

"'(a) A direct causal connection between the conditions under which the work is performed and the disease; (b) that the disease followed as a natural incident of exposure by reason of the employment; (c) that the disease is not of a character to which the employee may have had substantial exposure outside of the employment; (d) that the disease is not an ordinary disease of life to which the general public is exposed; (e) that the disease must appear to have had its origin in a risk connected with the employment and to have flowed from that source as a natural consequence.' Ga. L. 1971, pp. 895, 900." Synalloy Corp. v. Newton, 254 Ga. 174, 179 (326 SE2d 470) (1985) (Gregory, J., dissenting).

3. The occupational-disease provisions of the Workers' Compensation Act are now found in Art. 8 of OCGA Title 34. OCGA §34-9-280 et seq. As previously stated, the provision in controversy in this case, §34-9-285, mandates that where an occupational disease and some other noncompensable disease or infirmity coexist, "the compensation payable shall be reduced and limited only to such proportion of the compensation that would be payable if the occupational disease were the sole cause of the disability or death as such occupational disease, as the causative factor, bears to all the causes of such disability or death."

However, as previously stated, where neither the pre-existing condition nor the compensable injury constitutes an occupational disease, the Workers' Compensation Act contains no provision

comparable to §34-9-285, and the cases simply hold that aggravation of the pre-existing injury or infirmity is compensable as a "new accident." E. g., Cotton States Ins. Co. v. Rutledge, 139 Ga. App. 729, 730 (229 SE2d 531) (1976).

We disagree with the appellant's argument that this disparity in treatment violates the Equal Protection Clause.

"In reviewing the charge that [§34-9-285] violates the equal protection guarantees of the Federal and State Constitutions, this court will apply a rational basis standard of review. There is no suggestion that the right asserted by petitioner is fundamental or that a suspect classification exists in the case. Therefore, the standard of review is that the classification not be arbitrary or unreasonable (Dandridge v. Williams, 397 U. S. 471 (90 SC 1153, 25 LE2d 491)), and

that a fair and substantial relationship exist between the classification and the purpose of the law. Reed v. Reed, 404 U.S. 71 (92 SC 251, 30 LE2d 225) (1971)." Bickford v. Nolen, 240 Ga. 255, 256 (240 SE2d 24) (1977); Guess v. Workmen's Comp. Appeal Bd., 466 A2d 1098 (Pa. C. 1983); Holt v. Nevada Industrial Comm., 578 P2d 752 (Nev. 1978).

"[I]n 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' Williamson v. Lee Optical Co., 348 U. S. 483, 489 [75 SC 461, 465, 99 LEd 563] (1955)." Jefferson v. Hackney, 406 U. S. 535, 546 (92 SC 1724, 1731, 32 LE2d 285

(1972), citing from Dandridge v. Williams, supra, 397 U. S. at p. 485; Guess v. Workmen's Comp. Appeal Bd., supra.

The appellee advances various differences between occupational diseases and other injuries compensable under the Workers' Compensation Act, which would authorize their disparate treatment.

First, it is pointed out that by enacting the occupational-disease provisions of the Act, the General Assembly recognized that occupational diseases were prevalent and widespread in the industries in this state. As argued by the appellee, "since employees of certain industries, such as the asbestos industry, were almost certain to file more claims against their employers than the average worker in other industries, the legislature could have felt that certain

industries could not withstand the financial impact of compensating employees who were disabled not only as a result of an occupational disease, but whose disability resulted because an occupational disease contributed in some form to the employee's disablement by aggravating a pre-existing disease. Generally...an employer can afford to compensate a claimant for the aggravation of a pre-existing condition as the amount of claims against it will be significantly less than an employer who is engaged in the asbestos industry or similar trade. The legislature simply may have felt that since a certain number of occupational-disease claims are to be expected in particular industries, those industries could not survive unless they were responsible only for that portion of a claimant's disability which is related

to his occupational disease." See Guess v. Workmen's Comp. Appeal Bd., supra.

Moreover, as argued by the appellee, where an occupational disease is involved, it is generally much more difficult to determine when aggravation of the pre-existing condition becomes the cause of the disability. This is so because occupational diseases arise gradually from a day-by-day exposure to unhealthful conditions over an extended period of time, whereas, in the case of other compensable accidents, the accident and damage resulting therefrom are usually "practically simultaneous." See Hall v. Synalloy Corp., 540 FSupp. 263, 268 (S. D. Ga. 1982) citing McIntyre v. E. J. Lavino & Co., 25 A2d 163, 164-165 (Pa. 1942). The appellee argues that this difficulty in determining when such an

aggravating injury occurs in an occupational-disease case warrants the legislative enactment of §34-9-285 to apportion benefits according to the percentage of disability which properly can be related to any occupational disease. We find this argument to be persuasive. See Holt v. Nevada Industrial Comm., supra.

4. Where, as here, a worker's compensation claim involves the question of the extent to which the claimant is disabled by an occupational disease, the matter is properly referred to the medical board. Whitaker v. Fieldcrest Mills, Inc., 174 Ga. App. 533 (1) (330 SE2d 761) (1985) and cits.

5. We do, however, agree with the appellant's argument that the award of $13.50 per week violates the requirement of §34-9-261 that the weekly benefit for

total disability not be less than $25 per week (except when the weekly wage is below $25).

In this regard, §34-9-284 provides that the "[t]he amount of the compensation for any occupational disease shall be based upon the average weekly wages of the employee, as determined under Code Section 34-9-260." Section 34-9-260 provides that, except as otherwise provided, the computation of the "average weekly wages of the injured employee" is subject to limitations as to minimum amounts provided for in §34-9-261.

Accordingly, although we hold that the superior court was correct in denying the appellant's constitutional challenge to §34-9-285, we vacate the judgment and remand the case to the superior court with the direction that the award be amended by substituting the amount of $25 per week in

place of the $13.50 per week contained in the award of the full board.

Judgment vacated and case remanded with direction. All the Justices concur, except Smith, J., who dissents, and Gregory and Bell, JJ., who concur specially.

GREGORY, Justice, concurring specially.

I concur in the judgment in this case because I cannot say that it is irrational for the legislature of Georgia to follow one rule for occupational diseases and another rule for other compensable injuries. It may be that the legislature determined that full compensation for occupational diseases would be an unbearable burden for certain industries in this state. However, I cannot agree with all that is said in this opinion in support of that conclusion.

In Division 3 the majority opinion cites Hall v. Synalloy Corp., 540 FSupp. 263, 268 (S. D. Ga. 1982), for the proposition that it is less difficult to apportion responsibility for a loss when dealing with an injury than it is for apportioning responsibility for a loss when dealing with an occupational disease. This distinction would seem to support an opposite result from the one reached in the majority opinion. After all, our statute apportions compensation as to occupational diseases but does not apportion compensation as to compensable injuries.

I am authorized to state that Justice Bell joins in this special concurrence.

DECIDED MAY 29, 1986

RECONSIDERATION DENIED JUNE 10, 1986.

Workers' compensation; constitutional question. Rockdale Superior Court. Before Judge Vaughn.

Hazleton & Sweet, John F. Sweet, for appellant.

George L. Pope, Jr., for appellee.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-8045

D. C. Docket No. 85-3776

GWENDOLYN PRICE,

Plaintiff-Appellant,

versus

JOSEPH TANNER, Commissioner of Labor of the State of Georgia, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia

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Before VANCE and CLARK, Circuit Court Judges, and GARZA*, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern

District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

CLARK, Circuit Judge, dissented and filed an opinion.

*Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Entered: September 22, 1988

For the Court: Miguel J. Cortez, Clerk

By: _____
Deputy Clerk

ISSUED AS MANDATE: November 14, 1988

UNITED STATES COURT OF APPEALS

Eleventh Circuit

56 Forsyth Street, N.W.

Atlanta, Georgia 30303

November 1, 1988

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

Re: No. 87-8045 - Gwendolyn Price v. Joseph Tanner

(DC No. C85-3776A)

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: _____
Deputy Clerk

-le-

Encl.

cc w/enclosure to: Mr. John F. Sweet
Mr. Bryndis Roberts Jenkins
Ms. Annette M. Cowart

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 87-8045

GWENDOLYN PRICE,

Plaintiff-Appellant,

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ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion September 22, 11 Cir., 1988, __F. 2d__).

Before VANCE and CLARK, Circuit Judges, and GARZA*, Senior Circuit Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*Honorable Reynaldo G. Garza, Senior U.S. Circuit Judge for the Eleventh Circuit, sitting by designation.